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WHAT SHALL BE DONE WITH THE MOBS?

By Duane Mowry.

The recent outbreak in Springfield, Illinois, is another evidence that the rule of the mob is not sectional, but extends throughout the entire country.

Why is it that whole communities undertake to administer the law after their own way? Why is it that there seems to be no abatement in the number of these outbreaks? The answer is not hard to give. It is because mobs are practically assured freedom from *all* punishment. The word "all" is used advisedly. The history of prosecutions for the crime of mobs shows that but few cases of prosecutions have been attempted as compared with the great number of offenses actually committed, and but a comparatively few of those prosecutions have resulted in convictions. And in practically all of those cases, the prisoner was pardoned at an early period of his term.

This country prides itself upon its intelligence, upon its law-abiding qualities, upon its progressive ideas. And yet the fact remains to its everlasting shame and disgrace that the rule of the mob prevails here in larger measure than it does in any other civilized portion of the globe. Lynch law has become so frequent in this country that Justice Brewer, of the Supreme Court of the United States, says that it may be regarded as "a habit" of the American people. "Scarcely a day passes," he says, "that the people of some community have not, as it is said, taken the law into their own hands." Think of calling a crime "a habit," and that, too, by one of the justices of the highest court in the land. And yet the facts amply justify the statement.

Now, what is imperatively needed to meet this situation at the present time, as Dr. Cutler well says, those persons who compose the mob, and others may be included, too, have small respect for the law and less fear of it. For them it is absolutely necessary to invoke a policy which will bring about a change of feeling upon the situation. They must be taught to regard the law and have righteous dread of its violation. This cannot be accomplished by the existing laws as at present administered. The history of judicial procedure fully confirms this statement. Arrests are rarely made; convictions are next to impossible. Certainty of conviction of the guilty is the end to be aimed at. How is this to be attained? Only by radical changes in the criminal procedure of the country.

In the first place: The place of trial of those accused of the offense must be changed to some other part of the state than the county where it is charged the offense was committed. This is necessary in order to get a fair and impartial jury, fair and impartial alike to the state and the accused. To hope for a conviction by a jury of the county where the offense was charged to have been committed, no matter how overwhelming the evidence may be, is as reasonable to the average individual as to expect water to flow up hill. The right to change the place of trial should be vested in the state, and should be absolute.

Second: To allow a change of place of trial would make necessary an amendment to the respective constitutions of the states. For the constitutions now provide that the accused is entitled to a speedy trial by a jury of his county. This constitutional provision has worked a miscarriage of justice so often that the amendment is necessary in the interest of good order and the fair administration of the criminal laws.

Third: A preponderance of credible evidence should be sufficient to convict members of a mob. Evidence which satisfies beyond a reasonable doubt should not be required. The rule of evidence should be changed in this regard. The temptation

to commit perjury is so great that the change in the rule of evidence is absolutely essential in order to accomplish the ends of justice in this class of cases.

Fourth: Prosecuting attorneys are usually made by the electors of the respective counties. This fact serves, in many instances, and I personally believe, in most instances, to deter the state's attorney from vigorously prosecuting the mob. It seems wise, therefore, that the governor and the attorney general should have the discretionary power to substitute another attorney to prosecute the mob, supplanting the local prosecutor with an attorney who would not be controlled by local sentiment and feeling. A vigorous and determined prosecution is necessary that a conviction may follow. And it is a conviction of whole communities of guilty persons that is aimed at all of the time.

Fifth: In case the jury should acquit, the state should have the absolute right to have the case reviewed by the higher court before an absolute discharge of the prisoner or prisoners be entered. This is not a new suggestion, but is advocated by many able members of the bench and bar. It seems essential to prevent the miscarriage of justice in criminal cases. Undoubtedly, the near future will find such legislation on the statute books of many of the states.

These are confessedly radical changes in the existing criminal procedure of the land. But they are not too radical. The triumph of lawless force throughout the length and breadth of the land, a force that is unwhipped of justice, demands that this change should be made. It is true that Americans are a patient people. And they seem willing to bear the ills they have for an indefinite period, rather than fly to others that they know not of. But to maximize one lawless act in an attempt to minimize another infinitely greater to the entire social order of the country, is both cruel and preposterous to the ultimate degree. It has no foundation in reason or justice.

We want no self-appointed conservators of peace and order. Such persons belong to the dark ages, and to the savages of the woods and plains. They are not good citizens. And the citizenship they have should be taken from them.

Quite apart from the foregoing, and yet closely related to it, is the suggestion that compensation be accorded the legal heirs of the victim of the mob by the state or county which failed to give adequate protection against the mob. Several of the states, (Illinois is one), have such a statute in force at the present time. It is a wise and eminently just provision. It can hardly fail of having a salutary influence.

NOTES OF IMPORTANT DECISIONS

CRIMINAL TRIAL—COMMENTS OF JUDGE ON GIVING INSTRUCTIONS.—Some judges have so little judicial bearing, so much of the spirit of the advocate that they never can resist the temptation to take sides in every case that comes before them. Such judges are able to keep their partisan interference out of the record, but very often they display their improper interest in the case in the more formal parts of the record and thus give occasion to courts of last resort to reverse verdicts and saddle the expense of a new trial upon the state.

This is what happened in the recent case of State v. King (Wash.), 97 Pac. 247, where it was held to be reversible error for a trial judge, in showing apparent reluctance to give an instruction on the defense of an alibi to state that he did not think it was necessary to instruct on the matter of alibi, but he would explain what it meant, since such comment was, in effect, infringing upon the province of the jury to pass upon the credibility of the evidence uninfluenced by the remarks of the court.

The appellate court's opinion is a sharp rebuke to the lower court for this unnecessary interposition of its own opinion on the facts. The court said: "Appellant contends that the remark of the court 'I don't think it was necessary to instruct the jury on that point,' tended to disparage the defense in the mind of the jury. We think this criticism has merit. This remark was prompted by one of two ideas, either that the evidence tending to prove an alibi was unworthy of consideration, or that the jury already knew the legal effect of such proof. In either event the remark was clearly reversible error, because there was evidence which tended to prove that the defendant was

at his home in bed sick when the crime was committed. It was exclusively the province of the jury to consider and pass upon the credibility of this evidence uninfluenced by the trial judge as to its credibility. There is nothing in the record to show that the jury were informed or knew the legal effect of an alibi if proven in the case, and it was therefore the duty of the court to give to the jury the law upon the question."

REGULATION OF RATES TO BE CHARGED BY PUBLIC SERVICE CORPORATIONS. —II. RAILROAD COMPANIES.*

In General.—Railroad companies are carriers for hire.[1] They are incorporated as such, and given extraordinary powers in order that they may the better serve the the public in that capacity.[2] They are engaged in a public employment affecting the public interest, and subject to legislative control as to their rates of fare and freight, unless protected by their charters.[3] They must carry when called upon to do so,[4] and, in the absence of any statutory regulation of the subject, they can charge only a reasonable compensation for the carriage.[5] When controversies arise as to the reasonableness of such charge the judiciary must decide the question for them as it does when similar controversies arise where the rights of private individuals are concerned.[6] In the transaction of their business railroad companies have no superior rights, but are subject to the same control and treatment as are private persons or corporations.[7] If the legislature prescribes a rate of charge for the guidance of such companies this act does not wholly remove the question of reasonableness from the jurisdiction of the courts. They are still possessed of sufficient authority to pass upon the reasonableness or unreasonableness of the statutory rate.[8]

When they see fit to do so, railroad companies may call upon the legislature to fix permanently a maximum rate of charge for their services, and have such provision made a part of their charters. When this is done their charter may present a contract against any future legislative interference.[9]

Police of Railroads; Extent of Exercise of Police Power Over Railroads.—In addition to the powers that may be reserved to the legislature by the constitution of a state, or to be found in charters incorporating railroad companies, the power to regulate such corporations may be found in the general control of the police of the country which is exerted by the law making power of all free states. Railroad companies may be given the right to regulate their own internal police, to be carried into effect by means of by-laws and the like, but such right or privilege is subject to the superior control of the legislature. This is a responsibility which legislatures cannot divest themselves of if they would. This power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all the people, and the protection of all property within the state. According to the maxim, *sic utere tuo ut alienum non laedas*, which is of universal application, it must be within the range of legislative action to define the mode and manner in which all persons may use his own, so as not to injure others. So far as railroads are concerned, this police power, residing primarily and ultimately in the legislature, is for the police of the road, and, when not exerted by the legislature, may be exercised by the corporations themselves over their operatives, and to some extent over all who transact business with them or come upon their grounds, by means of general statutes and the assistance of their officers. But when the public good demands it, the legislature may require railroad companies to maintain such a system of police as the public interest requires.[10] The limit to the exercise of the police power over charter contracts is substantially this: The regulations must have reference to the comfort, safety, and welfare of society.

*The law on this subject as affecting other than railroad corporations is fully treated in Part I of this article published in last week's issue of the Central Law Journal.

(1) Lawson's Rights, Rem. & Practice, sec. 1792.

(2) Chicago etc. R. Co. v. People, 67 Ill. 11.

(3) Munn v. People, 94 U. S. 113; Peik v. R. R. Co., 94 U. S. 164; Budd v. New York, 143 U. S. 517; Dow v. Beidelman, 125 U. S. 680. A railroad is but an improved modern highway, one which it is the duty and interest of the government to construct, when the public interest and convenience demand it. Davidson v. Com'rs., etc., 18 Minn. 482; Sharpless v. Mayer, etc., 21 Pa. St. 147; Cherokee Nation v. R. R. Co., 135 U. S. 641; Lake Shore, etc. R. Co. v. Ohio, 173 U. S. 285.

(4) Lawson, Rights, Rem. & Pract., secs. 1797, 1870.

(5) People v. Budd, 117 N. Y. 1, 20; 143 U. S. 517; Munn v. Illinois, supra; Chicago, M. & St. P. R. Co. v. Minn. 134 U. S. 418; Winona, etc. R. Co. v. Blake, 94 U. S. 179; Reagan v. Farmer's Loan, etc. Co., 154 U. S. 362; Chicago, etc. R. Co. v. Osborne, 52 Fed. Rep. 912.

(6) Stone v. Farmer's etc. Co., 116 U. S. 307; People v. Budd, 117 N. Y. 1; 143 U. S. 517; Munn v. Illinois, 94 U. S. 113.

(7) Minn., St. L. R. Co. v. Beckwith, 129 U. S. 26; Smyth v. Ames, 169 U. S. 466, 522, 526; Lake Shore, etc., R. Co. v. Smyth, 173 U. S. 684. See Missouri Pac R. Co. v. Maikey, 127 U. S. 205; Stone v. Farmers', etc. Co., 116 U. S. 307.

(8) See paragraph No. 16.

(9) C. B. & Q. R. Co. v. Cutts, 94 U. S. 155.

(10) Thorpe v. R. R. Co., 27 Vt. 140. See Hageman v. R. R. Co., 16 Barb. 353.

They must not be in conflict with any of the provisions of the charter; and they must not under the pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers.[11] But a railroad company, even when it has been given an irrepealable charter, may be subjected to such subsequent laws as are necessary to secure the safety or protection of the public.[12] The control of the legislature over railroad companies may extend to the supervision of their tracks, switches, or the running upon the time of other trains; the use of improper rails; the number of brakemen upon a train; the running beyond a given rate of speed; and the employment of intemperate or incompetent engineers or servants. The legislature may require all their trains to come to a stand at railroad crossings or draw bridges. It may require the erection of fences along their right of way as a protection against the incursion of live stock, and subject the companies to damages for all stock killed upon their tracks, upon failure to comply with such requirement, without reference to the question of negligence, misconduct or inevitable accident.[13] It may forbid discrimination by such companies in the carriage of persons or goods;[14] and it may authorize an indictment against those who employ conductors without certificates as to color blindness as required by statute.[15] It may require the speed of all trains to be checked at exposed places;[16] and it may permit one railroad company to cross another's tracks. And it may require the former to share the expense of the crossing.[17] But a statute making railroad companies liable for the expense of a coroner's inquest, and the burial of persons dying on their cars, or killed by collision or otherwise, is unconstitutional, so far as it attempts to make them liable in cases where they have violated no law or been guilty of no negligence.[18] The legislature may require railroad companies to widen their bridges within cities for the convenience of the public.[19] It may require them to light their roads, and upon failure to do so they may be made liable to a city which performs such service.[20] Upon their failure to deliver freight on tender of charges they may be made liable to the owners for an amount equal to the charges for every day's detention.[21] They may be required to transfer car load lots from one line to another without unloading, unless such unloading is done without expense to the shipper.[22] Street car companies may be compelled to make quarterly reports of the number of passengers carried by them.[23] But a law which imposes a penalty on railroad companies for failure to pay certain debts, is not a proper exercise of police power, and is invalid.[24] But they may be forbidden to lease their roads, or consolidate with foreign corporations, until the consent of the legislature has been obtained.[25] The legislature, however, has no right to take away or destroy their property, or annul the contracts of such corporations with third persons.[26]

Right to Construct Railroads—Franchises.—As we have before observed, a railroad is but an improved modern highway,[27] which it is the duty of the state to construct when the public welfare and convenience demands it.[28] It is the duty of the government, with respect to the welfare of the public in general, and of trade in particular, to provide safe and commodious way of travel and communication. The state, however, may not choose to perform this duty directly. But as the right to make roads and to levy tolls is a prerogative of sovereignty, there

(11) Cooley, Const. Law, 311; Beer Co. v. Mass., 97 U. S. 25. A railroad company, although a quasi-public corporation, and although it operates a public highway, Cherokee Nation v. R. R. Co., 135 U. S. 641; Lake Shore etc. R. Co. v. Ohio, 173 U. S. 285, has rights which the legislature cannot deprive it of without a violation of the federal constitution Symth v. Anes, 169 U. S. 466. Although under governmental control, that control must be exercised with due regard to constitutional guaranties for the protection of the property of the railroad companies. Lake Shore, etc. R. Co. v. Smyth, 173 U. S. 684.

(12) De Cuir v. Benson, 27 La. Ann. 1; Chicago, etc. R. Co. v. People, 67 Ill. 11.

(13) Thorpe v. R. R. Co., 27 Vt. 140.

(14) Chicago, etc. R. Co. v. People, 67 Ill. 11; De Cuir v. Benson, 27 La. Ann. 1.

(15) Nashville etc., R. Co. v. State, 83 Ala. 71; 126 U. S. 96.

(16) Chicago, etc. R. Co. v. Haggerty, 67 Ill. 113.

(17) Fitchburg, etc. R. Co. v. R. R. Co., 1 Allen, 552.

(18) Ohio R. R. Co. v. Lackey, 78 Ill. 55.

(19) English v. R. R. Co., 32 Conn. 240.

(20) C. H. & D. R. Co. v. Sullivan, 32 Ohio St. 152.

(21) Houston & T. C. R. Co. v. Harry, 63 Tex. 256.

(22) Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 312.

(23) City of St. Louis v. St. L. R. Co. 14 Mo. App. 221.

(24) Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 151.

(25) Stockton v. Central R. Co., 50 N. J. Eq. 52.

(26) Greenwood v. Freight Co., 105 U. S. 13; Com'wealth v. Essex Co., 13 Gray, 239; People v. O'Brien, 111 N. Y 1; Detroit v. Detroit, etc. Road, 43 Mich. 140; Lake Shore, etc. R. Co. v. Smith, 173 U. S. 690.

(27) Rogers v. R. R. Co., 3 Wall, 654; Olcott v. Supervisors, 83 U. S. 678; Smith v. Ames, 169 U. S. 466.

(28) Davidson v. Com'rs., 18 Minn. 482; Sharpless v. Mayer, 21 Pa. St. 147. That the government has not only the power, but it is its duty and interest, to construct railroads when the public benefit and convenience demand them, cannot admit of doubt; and, in like manner, governments are justified in exacting toll from those who travel on them, as a means to reimburse the state for the expense of their construction and reparation. Bloodgood v. The Mohawk, etc. R. Co., 18 Wend. 47.

must be a delegation of the state's right. or permission must be given, before the subject may undertake to perform such duty in the state's stead. In the hands of the subject this right or permission is a franchise,—a privilege or immunity of such public nature that it cannot be exercised without legislative authority.[29] A franchise, which, in England, is a branch of the royal prerogative, subsisting in the hands of a subject, in this country can only be derived from the legislature. Franchises are here, as in England, privileges of the sovereign in the hands of the subject. Whoever claims an exclusive privilege with us must show a grant from the legislature. A privilege or immunity of a public nature, which cannot be exercised without legislative grant, is a franchise.[30]

Perhaps no principle of law is more firmly established in our jurisprudence than that the right to make and maintain a railroad, and to take tolls or fares from the public for the use thereof, is a privilege or immunity which can be exercised only by those who have obtained the state's consent. It is a privilege or immunity of precisely the same character as the right to construct an ordinary turnpike and levy tolls thereon.[31] It is competent, therefore, for the legislature, when conferring such franchises, to reserve the right to control its exercise. Possessing such right of control originally, the legislature will continue to possess it,—it will retain it in any given case, in so far as it does not part with it by conferring exemption therefrom upon the recipient of the franchise.[32]

Same.—Public or Private Use—Public Office —Public Interest—Rate of Charge—Contract.— Whether the use of a railroad is a public or a private one depends in no measure upon the question as to who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is of a public nature. Though the ownership is private the use is public.[33] The owners are regarded as exercising a sort of public office, in the duties of which the public is interested. All their rights and privileges, or those which pertain to such office, are granted by the state in the interest of the public. Their authority to take tolls and to exercise the right of eminent domain is conferred for the benefit of the public. They are, therefore, under governmental control, subject, of course, to constitutional guaranties for the protection of property.[34] Upon this principle it is held that statutes, declaring what shall be a reasonable compensation, or fixing a maximum beyond which any charge would be deemed unreasonable, for the use of property used and operated for railroad purposes, or for services rendered in such business, are within the competency of the legislature, and are constitutional.[35] The right, however, to regulate the charges of railroads may be bargained away by the legislature in particular instances. To guard against this contingency, the state may protect itself for all time, by constitutional provisions, and thus prevent any future curtailment of this right by

(29) Blake v. R. R. Co., 19 Minn. 418; Olcott v. Supervisors, 83 U. S. 678.

(30) Blake v. R. R. Co., 19 Minn. 418; 18 Am. Rep. 345.

(31) Blake v. R. R. Co., 19 Minn. 418; see Munn v. Illinois, 94 U. S. 113.

(32) Dow v. Beidelman, 125 U. S. 680; R. R. Co v. Cutts, 94 U. S. 155; R. R. Co. v. State, 134 U. S. 418; Ruggles v. People, 108 U. S. 536.

(33) The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, but they are obliged to permit the public to use their works in the manner in which such works can be used. Olcott v. Supervisors, 83 U. S. 678; Rogers v. Burlington, 3 Wall. 654; Pine Grove v. Talcott, 19 Wall. 666; Smith v. Ames, 169 U. S. 466.

(34) Munn v. Illinois, 94 U. S. 113; Budd v. New York, 143 U. S. 517; R. R. Co. v. Cutts supra; Dow v. Beidelman, supra; Smyth v. Ames, supra.

(35) The legislature has power to provide by law for a maximum of charge to be made by railroads for fare and freight upon the transportation of persons and property carried within the state, or taken up outside the state and brought within it, or taken up inside and carried without the state. Peik v. R. R. Co., 94 U. S. 164; Chicago, etc. R. Co. v. Ackley, 94 U. S. 179; Winona, etc. R. Co. v. Blake, 94 U. S. 180; Ruggles v. Illinois, 108 U. S. 536. A statute establishing a maximum of charge for transportation, is not unconstitutional. C. B. & Q. R. Co. v. Iowa, 94 U. S. 155; Stone v. Loan Co., 116 U. S. 307; Dow v. Beidelman, 49 Ark. 325; Same, 125 U. S. 680; Munn v. Illinois, 94 U. S. 113; R. R. Co. v. Minn., 134 U. S. 418. Such a law is not obnoxious to the constitutional provisions which declare that protection to the person and property is the paramount duty of the government and shall be impartial and complete. Tilly v. R. R. Co., 5 Fed. Rep. 641. The state may require railroads to advertise annually and adhere through the year to a tariff of fares. R. R. Co. v. Fuller, 17 Wall. 560. There is no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroads. Reagan v. Farmers', etc. Co., 154 U. S. 362; Stone v. Wisconsin, 94 U. S. 181; R. R. Co. v. United States, 99 U. S. 700; Atty. Gen. v. R. R. Co., 35 Wis. 425; Hinckly v. R. R. Co., 38 Wis. 194; State v. R. R. Co., 19 Minn. 434; R. R. Co. v. Cole, 29 Ohio St. 126; R. R. Co. v. Lawrence, etc. Co., 29 Ohio St. 208; R. R. Co. v. Steiner, 61 Ala. 559; Ruggles v. People, 91 Ill. 256; Ill. Cent. R. Co. v. People, 95 Ill. 313. The legislature cannot fix the rate for transportation too low. Atty. Gen. v. Germantown, etc. R. Co., 55 Pa. St. 466; Miller v. R. R. Co., 21 Barb. 513; Ex parte Kohler, 30 Fed. Rep. 86; Stone v. Natchez, etc. R. Co., 62 Miss. 646.

the legislature.[36] But when there is to be found no such constitutional security or reservation of power, the right of freely arranging their tolls may be granted to railroad companies, thus making any attempt by succeeding legislatures to disturb the same an impairment of a contract.[37] But where a railroad company accepts a charter simply authorizing it to take tolls for the carriage of freight and passengers, then the legislature will be permitted to alter or revise its schedule of rates at such times and in such manner as the public interest requires.[38] It may alter or revise the tariff schedule of a railroad company whose charter provides that the rate of charge for the transportation of passengers shall not exceed five cents per mile. This provision will not be construed as a contract between the state and the company to the effect that the fare should never be reduced below that rate.[39] Nor, where the directors of a railroad corporation are given power to make all needful rules, regulations and by-laws, touching "the rates of toll and the manner of collecting the same," will there be such an irrepealable contract between the state and the corporation as will authorize the latter for all future time to fix its rates of toll free from legislative interference.[40] On the contrary, it is held by both state and federal courts, that where a railroad company receives a charter, containing a provision of this character, it will take it subject to the general law of the state, and such future general legislation and constitutional provisions as the state may see fit to provide, in the absence of any prior contract between it and the state exempting it from legislative interference.[41] And this rule applies to charters of railroad companies which provide that they shall have the right "from time to time to fix, regulate and receive the tolls and charges by them to be received for transportation;" for the state, within the limits of its general authority, has the necessary power to act upon the reasonableness of the tolls and charges so fixed and regulated.[42]

The right of the state reasonably to limit the amount of charges to be received by railroad companies for the transportation of persons and property within its jurisdiction, is a power of government continuing in its nature, and cannot be bargained away by its legislature unless in words of positive grant, or in some manner equally as effective in law.[43] If there is reasonable doubt as to the purpose of the legislature, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall: "Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."[44] This rule is elementary, and the cases in the reports where it has been considered and applied are numerous. But there is nothing in the mere grant of power to make needful rules and

(36) Bondholders v. R. R. Com'rs., Fed. Cases, No. 1625. In this case it was held that when the legislature has constitutional power to alter all railroad charters thereafter granted, it may make alterations reducing traffic rates, although this diminshes the value of franchises and tangible property.

(37) Pingree v. R. R. Co., 76 N. W. Rep. 635; R. R. Co. v. Cutts, 94 U. S. 155.

(38) Atty. Gen. v. R. R. Co., 35 Wis. 425

(39) Dow v. Beidelman, 49 Ark. 325; Same, 125 U. S. 680.

(40) Chicago, etc. R. Co. v. Minn., 134 U. S. 418.

(41) Chicago, etc. R. Co. v. Minn. supra, and cases cited. A charter authorizing the directors of a railroad to adopt and establish such a tariff of charges for the transportaton of persons and property as they may think proper, and to alter and change the same at pleasure, is not a surrender of the state's right of control and regulation. Stone v. Ill. Cent. R. Co., 116 U. S. 347. See Penn. R. Co. v. Miller, 132 U. S. 75.

(42) Stone v. Farmers, etc., Co., 116 U. S. 307. In this case the court said, that while power is given to fix charges, they must be reasonable. What shall be deemed reasonable in law is nowhere indicated. There is no rate specified nor any limit set. Nothing is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the state had in the matter before the charter, is retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. Only the right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. In the case of Reagan v. Farmers', etc. Co., 154 U. S. 362, it was held that the courts were not authorized to revise or change the body of rates imposed by a legislature or a commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable, as between the carrier and the shipper. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to enquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. In the case of Smyth v. Ames, 169 U. S. 466, the court held that rates cannot be so conclusively determined by the legislature, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. See generally on this subject: Lake Shore, etc. Co. v. Smith, 173 U. S. 684; St. L. & etc. R. Co. v. Gill, 156 U. S. 649; Munn v. Illinois, 94 U. S. 113; Peik v. R. R. Co., 94 U. S. 164. Compare the latter cases with Atty. Gen. v. R. R. Co., 35 Wis. 425.

(43) Stone v. Farmers' etc. Co., 116 U. S. 307, and cases cited. See Chicago, etc. R. Co. v. Minn. 134 U. S. 418; Georgia R. Co. v. Smith, 128 U. S. 174; Stone v. Ill. Cent. R. Co., 116 U. S. 347; Penn. R. Co. v. Miller, 132 U. S. 75.

(44) Providence Bank v. Billings, 4 Pet. 560.

regulations touching the rate of toll and the manner of collecting it, which can be properly interpreted as a relinquishment by the state of its general authority to regulate, at any future time, as the public interest may require, the rates of toll to be collected by such companies.[45]

Classification of Roads for the Purpose of Fixing Rates.—The legislature, in the exercise of its power to regulate fares and freight, may classify the railroads of a state according to the amount of business which they have done or appear likely to do. Whether the classification shall be according to the number of passengers and the amount of freight carried,[46] or the amount of gross or net earnings, during a preceding year,[47] or according to the simpler and more constant test of the length of the line of the road,[48] is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there will be no violation of the constitutional provision securing to all the equal protection of the laws, no matter how the classification is made.[49] Such a rule is general and uniform, not because it operates upon every person in the state, (for it does not), but because every person who is brought within the relation and circumstances provided for is affected by it. It is general and uniform in its operation upon all persons in the like situation, and the fact of its being general and uniform is not affected by the number of persons within the scope of its operation. When its effect is not to grant to one railroad company privileges and immunities which, upon the same terms, do not belong to all other railroad companies, it is not unconstitutional; for whenever a company comes within a given class, it will acquire all the "privileges and immunities" that are enjoyed by any other company within that class.[50] A uniform rate of charges for all railroad companies in a state might operate unjustly upon some. It is proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads.[51]

Reasonable Rates.—While there is no doubt of the state's power if unhampered by contract, to provide by legislation for maximum rates of charges for railroad companies, yet this power is subject to the proviso that it cannot be arbitrarily exercised. The state must prescribe, through its legislature, such rates as will be just to both the carrier and the public. The question whether rates are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution provides for, or without due process of law, cannot be so conclusively determined by the legislature, or by regulations adopted under its authority, as to place the matter beyond the pale of judicial inquiry.[52] A law, or regulation made under legislative authority, which establishes a rate that will not admit of railroads earning such compensation for the carriage of persons or property, as, under all the circumstances, is just to them and to the public, is a deprivation of property within the meaning of the constitution, and cannot be sustained.[53] "It is not to be inferred," declared the Supreme Court of the United States, "that this power of limitation or regulation (by the state of the charges of railroad companies) is itself without limit. This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under pretense

(45) Chicago, etc. Co. v. Minn., 134 U. S. 418.

(46) C. B. & Q. R. Co. v. Cutts, 94 U. S. 155.

(47) C. B. & Q. R. Co. v. Atty. Gen., Fed. Cases, No. 2, 666; Ruggles v. People, 108 U. S. 526; Ill. Cent. R. Co. v. Illinois, 108 U. S. 541. A law fixing maximum rates of passenger fare upon railroads according to a classification based on the general passenger earnings, is not unconstitutional, as depriving them of property without due process of law. Wellman v. R. R. Co., 83 Mich. 592.

(48) Dow v. Beidelman, 125 U. S. 680. See State v. R. R. Co, 46 Neb. 682, where it was held that a statute requiring railroads, without judicial investigation, to carry freight over longer lines for the same rates imposed by any railroad for hauling the same freight between the same points by a shorter line, however great the disparity in the hauls, is in conflict with the Fourteenth Amendment to the constitution of the United States.

(49) Dow v. Beidelman, supra.

(50) C. B. & Q. R. Co. v. Cutts, 94 U. S. 155, See McAnnick v. R. R. Co., 20 Iowa 343.

(51) C. B. & Q. R Co. v. Cutts, supra.

(52) Smyth v. Ames, 169 U. S. 466; Lake Shore etc. R. Co. v. Smith, 173 U. S. 684; Chicago, etc. R. Co. v. Wellman, 143 U. S. 339; Reagan v. Farmers', etc. R. Co., 154 U. S. 362; St. Louis, etc. R. Co. v. Gill, 156 U. S. 649; Dow v. Biedelman, 49 Ark. 325; Same, 125 U. S. 680; R. R. Commission Cases, 116 U. S. 307; Chicago, etc. R. Co. v. Minn., 134 U. S. 418. There is no fully settled test by which the reasonableness of rates may be determined. Ames v. R. R. Co., 64 Fed. Rep. 165. But it is safe to say that a rate which is not sufficient to pay the costs of service is an unreasonable one. Clyde v. Railroad Co., 57 Fed. Rep. 436. Compare the above cases with the doctrine as formerly applied by the United States Supreme Court in the case of Peik v. R. R. Co., 94 U. S. 164.

(53) Smyth v. Ames, 169 U. S. 466; St. Louis, etc. R. Co. v. Gill, 156 U. S. 649; Covington Turnp. Co. v. Sanford, 164 U. S. 578. While the legislature may prescribe the rate of transportation, its power to do so is qualified so that it cannot impair or destroy any vested or corporate rights by providing for inadequate rates. Ex parte Koehler, 23 Fed. Rep. 525; Ball v. Rutherford R. Co., 93 Fed. Rep. 513. When a state undertakes to prescribe maximum rates on local business by an inter-state carrier, it must do so with reference exclusively to what is just and reasonable as between the carrier and the public in respect to domestic business alone: and interstate business cannot be made to bear losses resulting from the rates prescribed for local business. Smyth v. Ames, supra. See Tilly v. R. R. Co., 5 Fed. Rep. 641.

of regulating fares and freights, the state cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law."[54] While the courts will not enter upon the mere administrative duty of framing tariffs of rates for carriers, it is within their power, and, when the protection of persons and property require it, they will exercise such power, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property used for railroad purposes, the protection which the constitution affords. It has always been the right and duty of courts to say whether the act of one party operates to deprive another of any rights of person or property. In every constitution is to be found the guaranty against the taking of private property for public purposes without just compensation. Under the Fourteenth Amendment, no state can deny to the individual the equal protection of the laws. This Amendment forbids legislation by which property of one person is, without compensation, taken from him for the benefit of another, or for the benefit of the public. Law, and the machinery of government, must, in their operation, "stop on the hither side of the unnecessary and uncompensated taking or destruction of private property, legally acquired and legally held."[55]

Railroad Commissions—Fixing Rates.—The regulation of fares and freights may be carried on by means of commissions or administrative boards created by the state for carrying into effect its will as expressed by its legislation.[56] The powers usually conferred upon such bodies. over the matter of regulating charges for the transportation of persons and property, are very broad and full.[57] The principal restraint upon them is imposed by the commerce clause of the federal constitution; for that expressly prohibits any regulation of commerce between the states.[58] There are, of course, other constitutional restraints upon the powers of such commissions, but it is foreign to the purpose of this article to do more than incidentally mention them, or some of them, as we proceed.

While the state may create railroad commissions, and empower them to fix just and reasonable rates for transportation,[59] it cannot empower them, nor have they the right, to arbitrarly change or fix a tariff of rates without giving the companies to be affected the right to be heard in their behalf.[60] A law compelling a carrier to change its rates and adopt such charges as a board of commissioners may declare to be equal and reasonable, without providing for a hearing before the commission, is unconstitutional. The effect of such law would be to deprive such companies as are affected by its provisions of their property without due process of law, in so far as it makes the decision of the commission, as to what is equal and reasonable, final and conclusive.[61] Railroad companies have the right to require that just rates be fixed by the commission, and if a change of rates injures it in its property rights, this will be construed as a taking of its property within the meaning of the constitution. The courts may inquire into the justness of a change of rates, and appoint a special master to take testimony in relation thereto.[62] The state will not be permitted to enforce compliance with the rates prescribed by a commission, irrespective of their reasonableness, or to embarrass railroad companies in their effort to invoke the protection of the federal courts against the taking of their property without due process of law.[63] But if such rates are reasonable, railroad companies may be compelled to comply with the commission's order regulating fares, and the company will not be heard to complain that such requirement operates to take its property for public uses without due process of law.[64]

Joint Rates.—A law giving railroad commissions authority to compel railroad companies, whose tracks intersect each other, to put

(54) Stone v. Farmers', etc. Co., 116 U. S. 307, 331.

(55) Reagan v. Farmers', etc. Co., 154 U. S. 362. In this case it was held that the courts could not say that in every case a rate which deprives investors of property is necessarily an unreasonable one.

(56) Reagan v Farmers', etc. Co., supra, citing R. R. Commission Cases, 116 U. S. 307.

(57) Georgia, etc. R. Co. v. Smith, 128 U. S. 174; Winsor Coal Co. v. Dey, 38 Fed. Rep. 656; Burlington, etc. R. Co. v. Dey, 82 Iowa 312.

(58) Cunningham v. R. R. Co., 190 U. S. 446; Reagan v. Trust Co., 154 U. S. 362.

(59) Stone v. Loan Co., 116 U. S. 307; Tilly v. R. R. Co., 5 Fed. Rep. 641. See L. & N. R. Co. v. Commission, 19 Fed. Rep. 679.

(60) Mercantile Trust Co. v R R. Co., 51 Fed. Rep. 529; Same v. R. R. Co., Id.; Same v. Tyler, S. E. R. Co., Id.; Farmers' Loan & T. Co. v. R. R. Co., Id.

(61) Chicago, etc. R. Co. v. State, 134 U. S. 418. See Chicago, etc. R. Co. v. Jones, 149 Ill. 361, in which case it was held that a statute, making the schedule of maximum rates fixed by a commission prima facie evidence of the reasonableness of such rate, is constitutional. See also Richmond, etc. R. Co. v. Trammel, 53 Fed. Rep. 196, where it was held that the legislature cannot confer upon the commission power to finally fix the charges to be made for the transportation of freight and passengers without giving the railroads a chance to be heard. See also, Minn etc. R. Co. v. State, 134 U. S. 467.

(62) Clyde v. R. R. Co., 57 Fed. Rep. 436; Huidekoper v. Duncan, Id.

(63) Mercantile Trust Co. v. R. R. Co., 51 Fed. Rep. 529.

(64) Chicago, etc. R. Co. v. Becker, 32 Fed. Rep. 849; Chicago, etc. R. Co. v. Iowa, 94 U. S. 155; Blake v. R. R. Co., 19 Minn. 418. See Sloan v. R. R. Co., 61 Mo 24; Peik v. R. R. Co., 94 U. S. 164.

in connecting switches at such crossings, and to transfer cars and make joint rates, is not unconstitutional, as depriving the companies included within its provisions of the right to contract with reference to their own business affairs.[65] The fact that joint rates are fixed by special proceedings before the commission, under a joint rate act, after notice has been given to the companies interested, does not constitute a taking of their property without due process of law.[66]

Commissions Cannot Control Management of Road.—A state cannot invest railroad commissions with authority to notify a railroad company of what changes and improvements it should make, when it appears that repairs or additional rolling stock are necessary to keep its road in proper working order; or to say what changes of rates, or mode of operating its road, is desirable for this purpose. States have no authority to control the management of railroads, or to impair or take away their property rights, without due process of law.[67]

Railroad Tickets; Mileage Books; Ticket Brokerage — Mileage Books — Reduced Rates. Although the legislature has power to establish maximum rates of charges for carrying goods and passengers upon railroads, it cannot assume to interefere with the management of the company while conducting its affairs pursuant to a statute regulating rates and charges. [68] Nor can it provide for a discrimination, or exception, in favor of those who may desire and are able to purchase tickets at what might be termed wholesale rates. It cannot, under such circumstances, require a company to keep for sale at a specified price, less than the regular rates, mileage books, or one-thousand-mile tickets, to be used in the name of the purchasers, when the maximum rates for transportation of passengers have been previously established.[69] A requirement of this kind does not come within the legislative power to fix maximum rates, nor is it a proper regulation of the affairs of the company. On the contrary, it has been held that such an interference with the affairs of a railroad company is a taking of property within the meaning of the constitution.[70] Furthermore, if it is not permissible for the legislature to require a railroad company to keep on sale mileage books at reduced rates, it certainly cannot be competent to require it to redeem such books or tickets on presentation by other companies, or to accept those of other companies operating within the state as fare on its lines.[71] If the legislature possessed this power it could, in a manner, authorize one road to determine the conditions on which another road should carry passengers, which would be a plain invasion of private rights secured by the constitution.[72]

In like manner, it is unreasonable and illegal to require a street railway company to sell tickets at reduced rates when the road is only making a yearly net earning of a very small per cent on its bona fide investment, besides, at the same time, paying a very large rate of interest on its bonds.[73]

Ticket Brokerage.—In some of the states statutes have been enacted making the business of ticket brokerage or ticket scalping unlawful, and requiring railroad companies to redeem unused tickets. These statutes have been upheld in Illinois, Indiana, Pennsylvania, Minnesota and Texas; and declared unconstitutional in New York.[74] While this legislation is doubtless intended for protection against fraud, the statutes have been sustained in most instances on other grounds. For example, in Illinois, the prohibition was upheld on the ground that the sale of tickets is an incident to a business affected with a public interest and subject to legislative control.[75]

"We hold," said the Texas court, "in accordance with what we conceive to be the current of authority and the sounder view on this subject,

(65) Jacobson v. R. R. Co., 74 N. W. Rep. 893; 40 L. R. A. 389.

(66) Burlington, etc. R. Co. v. Dey, 82 Iowa 312.

(67) L. & N. R. Co. v. R. R. Commision, 19 Fed. Rep. 679.

(68) Lake Shore, etc. R. Co. v. Smith, 173 U. S. 684.

(69) Lake Shore, etc. R. Co. v. Smith, 173 U. S. 684; Beardsly v. R. R. Co., 56 N. E. Rep. 488.

(70) See cases cited in preceding note.

(71) Atty. Gen. v. R. R. Co., 160 Mass. 62.

(72) A statute of this character is also, in effect, an appropriation of property for public uses without the owner's consent. Atty. Gen. v. R. R. Co., supra.

(73) Milwaukee Electric Ry. Co. v. Milwaukee, 87 Fed. Rep. 577. The ordinance in question required the company, which was charging five cent fares, to sell six tickets for twenty-five cents, or twenty-five tickets for one dollar. The road's net earnings were only 3.3 per cent to 4.5 per cent on its investments, and it was paying 5 per cent interest on its bonds, in a city where the current rate of interest on first mortgage real estate security was 6 per cent.

(74) Burdick v. People, 149 Ill. 600; 36 N. E. Rep. 948; State v. Corbett, 57 Minn. 345; Fry v. State, 63 Ind. 552; Com'wealth v. Keary, 198 Pa. St. 500; People, ex rel Tyroler v. Warden, 157 N. Y. 116; 51 N. E. Rep. 1006; People v. Caldwell, 64 App. Div. 46; 71 N. Y. Sup. 654; 168 N. Y. 671; Com'wealth v. Wilson, 14 Phila. 384; 56 Am. & En. R. Cases, 230; Jannin v. State, 51 S. W. Rep. (Tex.) 1126.

(75) Burdick v. People, 149 Ill. 600, 26 N. E. Rep. 948. It was held in this case that a statute was constitutional which required steamboat and railroad companies to provide each ticket agent with a certificate of authority, and required the companies to redeem unused tickets, and forbade persons not having such certificates from selling such tickets, except that any one who has bought a ticket from a certified agent, with the bona fide intention of traveling upon the same, may sell it.

that the legislature was authorized, as was done in this act, to confine the sale of passage tickets on railroad companies to the agents of such companies, and to make it penal for any other person to make a sale of same; that the ticket of a railroad company is not property, in the general acceptation of the term, but the purchaser has only a special property to passage on the road; that common carriers within this state are peculiarly subject to regulation; and that to preserve and protect both the passenger and the company itself aginst fraud is within the province of the police power of the state, and not violative of any provisions of the constitution, nor can it be said that such regulation is any wise the creation of a monopoly."[76]

In New York, these statutes are unconstitutional, because they are, among other reasons, regarded as a denial to the citizen of the liberty of engaging in a legitimate business.[77]

(76) Jannin v. State, 51 S. W. Rep. 1126; 53 L. R. A. 349. In Fry v. State, 63 Ind. 553, it was held that an act of this kind was a valid police regulation, and that whatever may be said either for or against the justice thereof, the legislature in its enactment did not exceed its legitimate power under the state constitution. Nor did such law impair the obligation of contracts, nor grant to any one privileges and immunities denied to others.

(77) People v. Warden 157 N. Y. 116 Nealson v. R. R. Co., 5 N. Y. St. R. 256; Quimby v. Vanderbilt, 17 N. Y. 306; Ranson vs. R. R. Co., 48 N. Y. 212; 8 Am. Rep. 543; People v. Hogan, 71 N. Y. Sup. 461. In passing on a law which provided that no person shall sell a passage ticket giving any right to a passage on any railroad train unless he is an authorized agent of the company running such train, and has received a certificate of authority therefor in writing from such company, it was said in substance by the court that such law was not a valid exercise of police power; that the legislature could not regulate the conduct of a railroad company's business simply because it is a creature of the legislature and a common carrier. Whether a railroad ticket be a token or prima facie evidence of the contract of carriage, when sold it belongs to the person purchasing, and unless its use is in some way limited, it has the same quality as every other kind of property, and to deprive the holder of the right to sell the ticket deprives him of his property. The fact that some dishonest persons have been engaged in the ticket brokerage business, with the result that frauds have been perpetrated on both travelers and transportation companies, does not justify the legislature in depriving every citizen of the liberty to further engage in such business. Such law, it was further held, is not constitutional as a police regulation of the ticket brokerage business, since it does not tend to promote the health, comfort or welfare of society. It conflicts with the constitutional provision that no person shall be deprived of life, liberty, or property, without due process of law since it deprives citizens of their liberty of engaging in the legitimate business of ticket brokerage. People v. Caldwell, 71 N. Y. Sup. 654; 64 App. Div. 46; 168 N. Y. 671.

It is held that these statutes have no application to the sale of a single ticket by a person not a dealer therein.[78]

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(78) State v. Clark, 109 N. C. 739; State v. Ray, 109 N. C. 736. See Burdick v. People, 149 Ill. 600, 36 N. E. Rep. 948.

COURTS — SUPREME COURT — JURISDICTION—INJUNCTION.

STATE v. KENNER.

Supreme Court of Oklahoma, Aug. 29, 1908.

The supreme court is essentially a court of appeals, and is without original jurisdiction to issue writs of injunction in cases where the relief prayed for is purely injunctional.

KANE, J.: This is an original proceeding in the Supreme Court, commenced by the State of Oklahoma, on relation of Rutherford Brett, county attorney of Washita County, Okla., against H. A. Kenner, T. G. Sappington, and J. T. Hinds, county commissioners, W. B. Tharrington, county clerk of Washita County, Okla., and A. O. Campbell. The prayer of the petition reads as follows: "Wherefore, plaintiff prays that upon the hearing hereof, the said board of county commissioners, H. A. Kenner, T. G. Sappington and J. T. Hinds, and their successors in office, be perpetually enjoined from issuing said warrants, and from making any levy against the taxable property of said county for the purpose of redeeming said warrants, and from doing any further act looking to the fulfillment of said contract, and that W. B. Tharrington, county clerk of said county, and his successor in office, be enjoined from attesting any warrant or warrants issued or proposed to be issued, by the said board of county commissioners, or under its direction, in furtherance of the terms of said contract, and that the said A. O. Campbell be enjoined from taking any steps, or doing any act under said contract, with respect to the erection or construction of said courthouse, so provided for in said illegal contract, and that plaintiff have the costs herein incurred, and such other and further relief as it may be entitled to in equity."

From the foregoing it is obvious that the relief prayed for is purely injunctional. The question therefore arises: Has the Supreme Court original jurisdiction to issue writs of injunction in such cases? That the Supreme Court of the territory of Oklahoma had not

was settled in Walck v. Murray et al., 18 Okla. 712, 91 Pac. 238, and the other Constitutional Convention Cases reported in the same volume. These cases followed the case of Godbe v. Salt Lake City, 1 Utah, 68, wherein Mr. Chief Justice McKean, after a thorough analysis of the Utah organic act, which was practically the same as the organic act of Oklahoma Territory, says: "A careful and analytical examination of all the law upon the subject must lead, it seems to me, irresistibly to the conclusion that this court has not general original jurisdiction, and that it cannot entertain the questions arising in the case at bar until it shall be called to pass upon them, in its appellate capacity."

It follows that, if this court has original jurisdiction to issue writs of injunction, it acquired such power through some provision of the state constitution. The part of section 170, Bunn's Constitution, conferring original jurisdiction on the Supreme Court, provides that: "The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs as may be provided by law and to hear and determine the same." It will be noticed that specific mention of the writ of injunction is omitted from this clause of the Constitution. A great many of the states have similar clauses in their Constitutions; most of them, though, as South Dakota, North Dakota, Illinois, Wisconsin and others, in granting original jurisdiction to their supreme courts have included the writ of injunction in the grant. Section 87 of the North Dakota Constitution empowers the Supreme Court of that state to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunctions, and such other original and remedial writs as may be necessary to the public exercise of its jurisdiction. In State v. Nelson County, 1 N. D. 88, 45 N. W. 33, 8 L. R. A. 283, 26 Am. St. Rep. 609, it was held that "an injunction, restraining a county from issuing bonds to procure seed grain for needy farmers residing therein, will not be granted in the first instance by the supreme court under the North Dakota Constitution, § 87, authorizing such court to issue such writs; as it will issue such writs only in a limited class of cases, and not in a matter of purely local concern." And again in the case of State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234, the same court held that: "The design of the North Dakota Constitution, § 87, empowering the supreme court to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction, and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction was not to confer on such court concurrent jurisdiction with the district court over all such writs, but only to give the former court jurisdiction in those cases in which the prerogatives of the sovereign power are directly and in some public and important respect involved, or the liberty of the citizen is at stake." This doctrine is approved in People ex rel. Kocourek v. City of Chicago, 193 Ill. 520, 62 N. E. 179, 58 L. R. A. 833, wherein it is held that the "Illinois Constitution, art. 6, § 2, giving the supreme court original jurisdiction in mandamus cases, extends only to cases involving the rights, interest, and franchises of the state, and the rights and interests of the whole people, to enforce the performance of high official duties affecting the public at large, and in emergency (which the court itself is to determine) to assume jurisdiction of cases affecting local public interest or private rights when necessary to prevent a failure of justice." In the case of the Attorney General v. Railroad Companies, 35 Wis. 425-520, Mr. Chief Justice Ryan, after discussing the clause in the Wisconsin Constitution conferring original jurisdiction upon the Supreme Court, says: "This view excludes jurisdiction of injunction in private suits, between private parties, proceeding on private right or wrong. In excluding them we feel quite assured that we are only giving effect to the very purpose and limit of the constitution in the granting of injunction. * * * In our view the jurisdiction of the writ is of a quasi prerogative writ. The prerogative writs proper can issue only at the suit of the state or the attorney general in the right of the state; and so it must be with the writ of injunction, in its use as a quasi prerogative writ. * * * It is the duty of the court to confine the exercise of its original jurisdiction to questions publici juris."

The constitutions of all the above named states specifically mention the writ of injunction in the clauses conferring original jurisdiction upon their supreme courts, but it will be seen by the excerpts quoted, and from cases construing such clauses, that even where that is the case the supreme courts have been exceedingly careful in assuming original jurisdiction, confining the exercise of such jurisdiction to cases involving the rights, interest, and franchises of the state, and the rights and interests of the whole people, and to enforce the performance of high official duties affecting the public at large. It is clear to our mind that if the framers of our constitution intended to confer on the supreme court original jurisdiction to issue writs of injunction, they would have followed in that respect the example of the states above referred to, whose constitutions were no doubt before them, and would not have relied upon general terms to confer

original jurisdiction on a court whose ordinary jurisdiction is essentially appellate. There are other sound reasons for omitting the writ of injunction from the clause of the constitution conferring orignal jurisdiction on the supreme court and leaving such jurisdiction to the district courts of the state, which courts have general original jurisdiction, and are provided by law with the machinery for summoning and impaneling juries. Section 34, Bunn's Const. provides that: "The legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, that any persons accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction or restraint, made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given." In view of the foregoing restrictions upon the power of the courts to punish as for contempt the violation of injunctional orders, and in view of the fact that the supreme court is essentially a court of appeals, we are drawn to the conclusion that it is without jurisdiction to entertain the questions arising in the case at bar until it is called to pass upon them in its appellate capacity.

This construction also avoids the incongruity of giving to the supreme court original jurisdiction to issue writs of injunction when there is no adequate procedure to meet all the exigencies which may possibly arise from its exercise. Such an embarrassment was met by the supreme court of the territory in Territory ex rel. Galbraith v. Chicago, Rock Island & Pacific Railway Co., 2 Okl. 108, 39 Pac. 389. The organic act gave the supreme court of the territory original jurisdiction in mandamus proceedings. In the above case mandamus proceedings were joined with a cause of action which presented an issue of fact. Under the Code the parties had a right to demand a jury trial, which the court was bound to grant as a matter of right, and which was not a matter of judicial discretion. The supreme court held that in such a case it was powerless to act, no way of summoning a jury having been provided by the legislature for the supreme court, and the cause was accordingy dismissed.

We therefore, hold that the supreme court is without original jurisdiction to issue writs of injunction in actions where the sole relief sought is the issuance of such writ. The cause is dismissed. All the Justices concur.

NOTE.—*Extent of Original Jurisdiction Exercised by Courts of Appeal.*—Under the constitutions of many states, appellate tribunals are given power "to issue writs of mandamus, injunction, quo warranto, habeas corpus, prohibition and other remedial and original writs." This provision may vary somewhat in the enumeration of the writs specified in the various state constitutions, but this, we apprehend, for reasons which will appear later, offers no ground for any substantial distinction where such enumeration is followed by the all embracing phrase "and other remedial and original writs." On this account, therefore, we believe we can discuss the question presented without distinguishing the constitutional provisions of the various states.

We do not believe that the statement will be seriously disputed when we say that, undoubtedly, the first and prime object of granting to appellate courts original jurisdiction to issue certain remedial writs, is to give them necessary and competent means of exercising superintendence and control over inferior tribunals. And in the early North Carolina case of Bank of Newbern v. Stanley, 2 Dev. 476, it was held that it was incompetent for an appellate court to use its original jurisdiction to control the acts of the officers of a subordinate court, except in the exercise of, and as ancillary to its revising power. Such is the view adopted by the Alabama courts, Ex parte Candee, 48 Ala. 386, loc. cit. 412; Ex parte Croom, 19 Ala. 562. In these cases it is held that the court can issue the original writs enumerated only after a lower court of general original jurisdiction has failed or refused to act. This exercise of jurisdiction is purely ancillary to the appellate jurisdiction of the court. It proceeds on the assumption that one of the purposes of the power to issue extraordinary remedial writs, is to prevent a failure of justice through the improper or arbitrary exercise of discretion on the part of trial judges in such cases where the slow processes of appeal would be ineffective to obtain redress. Thus, in *habeas corpus* proceedings application must be first made to a lower court and on refusal or failure of such court to grant the application, may be renewed, in lieu of appeal, in the supreme court. Ex parte Croom, supra. It has therefore been held that the right to appeal in habeas corpus proceedings did not affect the right to renew the application in the supreme court, the remedies being concurrent and both being an exercise of superintending control over inferior jurisdictions. This use of the extraordinary and remedial writs, it will be observed, is not strictly an exercise of original jurisdiction but more aptly ancillary to and in aid of the exercise of the right of appeal.

On the question as to the extent of the appellate court's strictly original jurisdiction to issue such writs, many appellate tribunals are in the utmost confusion as to what to do with the constitutional grant of power to issue the extraordinary writs, as usually enumerated, as well as the other "original and remedial writs," whatever this phrase might signify. The difficulty arises from the arbitrary and inconsistent construction of such clauses. For instance, writs of *habeas corpus, quo warranto* and prohibition are usually issued generally and without limitation in competition with like powers granted to courts of general original jurisdiction. But when the writs of mandamus and injunction are considered, the courts become fearful of their powers and even

where such writs stand shoulder to shoulder in the enumeration of original powers granted to a supreme court, they will not be issued with the same confidence and abandon. We apprehend, however, that the logic of the situation demands that at least all enumerated writs be treated with the same consideration. If the appellate court construes its power to issue writs of *habeas corpus* and *quo warranto* as concurrent with courts of general original jurisdiction, it should assume to exercise such concurrent jurisdiction in the issuance of writs of mandamus and injunction. This is the position taken by the South Carolina courts and possibly other tribunals. (State v. Hayne, 8 S. Car. 367). But, while this rule may be strictly logical, such a construction leads to even greater difficulties, as it opens the doors of our appellate courts, whose dockets are already crowded, to a flood-tide of litigation which they usually have not the proper means or equipment to handle as well as not being physically capable of transacting the amount of business that might be required of them.

Some appellate courts are so jealous of maintainmg their theoretical right to the original jurisdiction granted to them and so violently opposed to ever exercising that jurisdiction in cases that have been presented to them, that lawyers in many states are confronted with the anomalous situation of having a recognized constitutional right to seek certain remedial and original writs directly from the supreme court, but being frequently arbitrarily denied redress. Thus, in Missouri, where the supreme court has authority to issue writs of *quo warranto* "and to hear and determine the same," the courts have held that they will only take jurisdiction when suit is begun by the attorney general, but at the same time will not renounce its jurisdiction to issue the writ at the relation of private parties whenever "a proper case" may come before it. Stewart v. McIlhaney, 32 Mo. 382; Hequembourg v. Lawrence, 38 Mo. 535; State v. Vail, 53 Mo. 97. In the last case cited the court said: "Whether this court will exercise jurisdiction in cases of information (in the nature of *quo warranto*) on the relation of a private person is another matter, depending somewhat on the discretion of the court; and where the statutes have provided other tribunals for their adjudication having all the power of this court and more facilities for the trial of issues that may arise, this court has generally declined the investigation of such cases."

The leading authority on this question without doubt is Chief Justice Ryan's masterful opinion in the case of Attorney General v. Railroad Companies, 35 Wis. 425, loc. cit. 511. But to observe this splendid and careful jurist struggling desperately with the question of the extent of the original jurisdiction conferred upon the supreme court of his state is to get some idea of the magnitude of the issue which one fails to appreciate in jurisdictions where more superficial judges arbitrarily cut the Gordian Knot by accepting and refusing jurisdiction at their pleasure without conscientiously striving to settle upon some logical and reasonable rule. The difficulty in the Wisconsin case was with the writ of injunction. Chief Justice Ryan first observed that this writ, unlike the others enumerated, was not an original writ, but one purely remedial and non-jurisdictional. Jurisdiction was obtained by ordinary process and not by the mere issuance of the writ and the question immediately arose, whether or not the grant of power to issue this writ was in effect a grant "of general equitable jurisdiction, in all cases, between all parties, where injunction is prayed." Justice Ryan instinctively recoiled from this construction, saying: "It would be a gross blemish upon the symmetry and economy of the constitutional distribution of jurisdiction, a solecism against the constitutional order observed in it, to attribute to the supreme court of the state original jurisdicion in one class of causes of private right, which is carefully excluded in all other causes, for no inherent distinction." Justice Ryan then proceeds to give his own admittedly original solution to this difficult problem and which many other courts have been quick to adopt as offering some substantial ground on which to approach the exercise of the original jurisdiction granted to appellate tribunals. The result of Justice Ryan's conclusions are well stated in the quotation in the principal case. The conclusion he arrives at is that all these extraordinary writs are given to appellate courts not to protect private rights, but "to protect the general interests and welfare of the state and its people, which it would not do to dissipate and scatter among many inferior courts."

Justice Ryan's conclusion, however, in the case just mentioned, is not marred by the inconsistency so often apparent in discussions of this question. He proceeds to apply the rule to the entire grant of original jurisdiction, including writs of *habeas corpus, quo warranto,* etc., saying: "It is the duty of the court to confine the exercise of its original jurisdiction to questions *publici juris.* And hereafter the court will require all classes of cases, as it has hitherto done some, in which it is sought to put its original jurisdiction in motion, to proceed upon leave first obtained, upon a *prima facie* showing that the case is one of which it is proper for the court to take cognizance." Let the Oklahoma court in the principal case and every other court which has cited Justice Ryan's remarkable argument follow that argument to its logical conclusion and withdraw its original jurisdiction altogether from private exploitation to be reserved exclusively for the "more authoritative protection of strictly public interests," or as ancillary to its superintending control over inferior tribunals.

When this conclusion is reached, many other difficulties vanish. Thus, the ridiculous construction of the usual phrase, "and all other original and remedial writs," as meaning nothing more than the writs enumerated will not be necessary in order to exclude the writ of injunction in those states where that writ is not expressly enumerated. As Justice Ryan well says, the writ of injunction is clearly a "remedial writ" and therefore is as plainly included under that general term "other remedial writs" as if it were more specifically enumerated.

When it is once understood that these extensive grants of original jurisdiction which are given to our appellate tribunals are not for the purpose of placing such tribunals in unnecessary competition with courts of general original jurisdiction but for the sole purpose of protecting strictly public rights, and that even in such cases the writs are to issue not as of right, but on leave first obtained on a *prima facie* showing that the cause is one involving questions *publici juris.*

ALEXANDER H. ROBBINS.

NEWS ITEM.

VALIDITY OF CONTRACTS AGREEING TO GIVE RAILROAD MILEAGE IN RETURN FOR ADVERTISING.

"If it be lawful to make the exchange of railroad transportation for advertising then it would be lawful to do the same in every transaction and the railroad business might lawfully become one of barter and sale, limited only by the demand."

In a decision handed down today by Judge C. C. Kohlsaat in the United States circuit court, from which the above is quoted, the jurist enjoined the issuance of transportation by the Chicago, Indianapolis & Louisville Railway company to the publishers of Munsey's Magazine in exchange for advertising.

The decision was rendered in a test case in which the federal authorities brought suit to prevent the carrying out of a contract entered into in January, 1907, between the railroad company and Frank A. Munsey & Co., providing for the issuance of trip tickets or mileage to the value of $500 in consideration of certain advertising space in the publication of the magazine company.

The contract was alleged to be a violation of the Hepburn law.

Notice of an appeal to the United States supreme court was at once given by atorneys for the railroad company. The notice was filed in Judge Kohlsaat's court by E. C. Fields, vice-president and general solicitor for the Monon, following the reading of the opinion.

CORRESPONDENCE.

ALARMING INCREASE OF CASE LAW.

Editor Central Law Journal:

I have been attracted by the advertisement of the West Publishing Company in your issue of August 21st, to the effect that during the ten years from 1897 to 1906 the State and Federal Courts decided nearly one-half as many cases as had been decided in the two hundred and thirty-eight years preceding. This is really alarming. Is there no way to check this mass of opinions? Decisions now come so thick and fast, and there are so many conflicts, that the lawyer is quite at sea. Instead of the law becoming settled, it is becoming more and more unsettled. The majority of the opinions are also too long, showing a lack of care by the courts in studying the cases presented to them. The volume of case law produced from year to year is positively terrifying. The Attorneys General have recently organized an association, and possibly if the Supreme Courts of the country would meet in convention once a year they might devise some plan to limit this great output of decisions. In reading the digest in your Journal from week to week, I am astonished at the syllabi announcing in ordinary language the most primary and fundamental principles, as that a master is under obligation to provide a reasonably safe place for the servant to work.

Can you see any remedy for this trouble.

Yours truly,

G. E. McCAUGHAN.

Chicago, Ill.

HUMOR OF THE LAW.

"Give the devil his due." This phrase was turned very wittily by a member of the bar in North Carolina on three of his legal brethren. During the trial Hillman, Dews and Swain (the first-named distinguished lawyers, and the last also a distinguished lawyer and president of the university of the state) handed James Dodge, the clerk of the supreme court, the following epitaph:

Here lies James Dodge, who dodged all good,
And never dodged an evil;
And after dodging all he could,
He could not dodge the devil.

Mr. Dodge sent back to the gentlemen the annexed impromptu reply:

Here lies a Hillman and a Swain,
Their lot let no man choose;
They lived in sin and died in pain,
And the devil got his dues (Dews).

"I had a letter from a constituent," said Congressman Nathan Wesley Hale of Tennessee, "who asked me to forward him, as quickly as possible, the 'Rules and Regulations of Congress.' By return mail I sent him a photograph of Joe Cannon. If he understands the game like we do, he will have no trouble in seeing that my answer is decidedly to the point."—The Bar.

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Abatement and Revival**—Death of Joint Defendant.—When, in an action on a joint and several note, it is shown that one of the defendants has died since service had, the action abates only as to him, and, on verdict against all the defendants, the court may render judgment against the surviving defendants.—Gillespie v. First Nat. Bank, Okl., 95 Pac. Rep. 220.

2. **Action**—Nature and Elements.—A cause of action consists in, first, the primary right and the facts from which it flows; and, second, the breach of that right and facts constituting such breach, which elements taken together create a remedial right.—Lawson v. Tripp, Utah, 95 Pac. Rep. 520.

3.——Other Action Pending.—There is no technical rule that the issues and parties must be identical in all respects in each, in order that the trial of one action may be stayed until after the trial of the other.—De La Vergne Mach. Co. v. Brooklyn Brewing Co., 110 N. Y. Supp. 24.

4. **Adjoining Landowners**—Excavations.—As between the proprietors of adjacent land, neither proprietor may excavate his own soil so as to cause that of his neighbor to loosen and fall into the excavation.—Village of Haverstraw v. Eckerson, N. Y., 84 N. E. Rep. 578.

5. **Admiralty**—Reopening Case to Introduce Depositions.—After both parties have rested in a suit in admiralty and the case has been argued, it will not be reopened to permit the libelant to introduce depositions previously taken by the claimant, which the libelant might, if he had desired, have offered as a part of his own case.—The Persiana, U. S. D. C., S. D. N. Y., 158 Fed. Rep. 912.

6. **Adverse Possession**—Equitable Title of Plaintiff.—Limitations run against the holder of an equitable as well as against the holder of a legal title, and it is not essential to the bar of the statute that the title must be such as would support ejectment.—Hibben v. Malone, Ark., 109 S. W. Rep. 1008.

7. **Agriculture**—Destruction of Infected Apples.—If apples were infected, and their destruction was necessary to avoid injury to the fruit and the fruit interests of the state, the owners may not complain of their destruction by the state commissioner of horticulture.—Shafford v. Brown, Wash., 95 Pac. Rep. 270.

8. **Animals**—Killing Trespassing Animals.—In view of the omission from Rev. St. 1899, Sec. 3296, of the provision of the Rev. St. 1845, c. 79, Sec. 4, authorizing the killing of stock on the third incursion, where the landowner has a lawful fence, a landowner held criminally liable for killing another's stock, irrespective of how it gets into his field, unless the killing was necessary in an attempt to drive the stock out.—State v. Prater, Mo., 109 S. W. Rep. 1047.

9. **Appeal and Error**—Amendment to Statement.—Where numerous amendments have been allowed to a proposed statement on motion for a new trial, the statement should not be certified by the judge until all amendments allowed have been engrossed.—Doust v. Rocky Mountain Bell Telephone Co., Idaho, 95 Pac. Rep. 209.

10.——Record.—An unsigned memorandum indorsed on the findings of the jury, not referred to therein, and not in response to submitted questions, cannot be considered by the Supreme Court as a part of the findings.—Chicago, R. I. & P. Ry. Co. v. Brandon, Kan., 95 Pac. Rep. 573.

11.——Review.—Any irregularity or error connected with an order permitting the amendment of a demurrer after the same had been overruled was proper matter for determination on an appeal after final judgment.—Dent v. Superior Court of Los Angeles County, Cal., 95 Pac. Rep. 672.

12.——Settlement of Trust Accounts.—A decree of the probate court dismissing a petition filed by persons interested as remaindermen to compel a trustee to account and distribute the property held final and appealable.—In re Cary's Estate, Vt., 69 Atl. Rep. 736.

13. **Bailment**—Waiver as to Terms of Contract.—Acceptance of several months' rent after it was due, less a discount agreed to be paid on each month's rental paid before due, held not a waiver of the right of the lessor to collect the agreed rentals for subsequent months without the discount.—United Shoe Machinery Co. v. Abbott, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 762.

14. **Bankruptcy**—Conditional Sales.—Rev. St. Wis. 1878, Sec. 2317, held not to invalidate an unfiled conditional sale contract as between the parties, so that the buyer's trustee in bankruptcy did not acquire any greater rights with reference to the property than was possessed by the buyer.—Mishawaka Woolen Mfg. Co. v. Smith, U. S. D. C., W. D. Wis., 158 Fed. Rep. 885.

15.——Conditional Sales.—A contract reserving a lien on personal property unsold in the hands of the buyer and on the proceeds of the property sold held void as against the buyer's estate in bankruptcy because the contract was not filed.—Pontiac Buggy Co. v. Skinner, U. S. D. C., N. D. N. Y., 158 Fed. Rep. 858.

16.——Hearing in Bankruptcy Proceedings.—Declaring what shall constitute acts of bankruptcy, an alleged bankrupt corporation was not concluded in the bankruptcy proceedings by the appointment of a receiver of its assets in the state court, but was entitled to a hearing on the issue of insolvency at the time the bankruptcy petition was filed.—In re Pickens Mfg. Co., U. S. D. C., W. D. Ga., 158 Fed. Rep. 894.

17.——Preferences.—The fact that accounts assigned by a bankrupt to a creditor as collateral security more than four months prior to the bankruptcy were collected within the four-month period does not entitle the trustee to recover such collections as preferences.—Lowell v. International Trust Co., U. S. C. C. of App., First Circuit, 159 Fed. Rep. 781.

18.——Property in Possession of State Court.—A court of bankruptcy will not usually exercise its power to stay a suit in a state court and require it to surrender property taken into custody therein where it will result in no benefit to the estate, as where the suit is to enforce a valid lien exceeding the value of the property.—Orr v. Tribble, U. S. D. C., S. D. Ga., 158 Fed. Rep. 897.

19.——Provable Debts.—A claim held not provable under Bankr. Act, c. 541, Sec. 63a (4), as a debt on an implied contract.—Switzer v. Henking, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 784.

20.——What Constitutes Wages.—Commissions paid to a traveling salesman for his services are "wages" within Bankr. Act.—In re Dexter, U. S. C. C. of App., First Circuit, 158 Fed. Rep. 788.

21. **Banks and Banking**—Forged or Altered Check.—Where the erasure of the words "or order," and the insertion of the words "or bearer," in a check, without the authority of the maker, results in its payment to one other than the payee, the depositor's order cannot be charged with it.—National Dredging Co. v. President, etc., of Farmers' Bank of State of Delaware, Del., 69 Atl. Rep. 607.

22.——Ultra Vires Acts.—Where a bank receives the benefit of a transaction, it is bound to account notwithstanding its cashier exceeded his authority in assuming, on behalf of the bank to act in the transaction.—First Nat. Bank v. Bakken, N. D., 116 N. W. Rep. 92.

23. **Bills and Notes**—Bona Fide Purchasers.—A trust company receiving a check payable to a corporation in payment of the individual debt of the president of the corporation and another, held not a bona fide purchaser as against the corporation or its creditors, within Negotiable Instruments Law, Laws, 1897, p. 732, c. 612, Secs. 91, 94, 95.—Ward v. City Trust Co. of New York, N. Y., 84 N. E. Rep. 585.

24.——Drafts Drawn in Sets.—Where two sets of drafts were drawn, the duplicate to be paid only in case the original was unpaid, the holder made out a prima facie case by producing the duplicates duly protested with notice of payment given, without accounting for the originals.—Kessler v. Armstrong Cork Co., U. S. C. C. of App., Second Circuit, 158 Fed. Rep. 744.

25.——Joint Makers.—Persons appearing on a note as joint makers, but being in part merely sureties, were primarily liable to any holder of the note for the amount thereof, notwithstanding any irregularity in the indorsement.—Johnston v. Schnabaum, Ark., 109 S. W. Rep. 1163.

26.——Liability of Co-maker.—A signer of a note, being a co-maker, held not discharged by the payee's promise to release him, and look to the principal debtor alone for the payment of the note; the promise of release being verbal only, and without consideration.—Edmonston v. Ascough, Colo., 95 Pac. Rep. 313.

27. **Brokers**—Commissions.—In an action by a broker for commissions in procuring a tenant for defendant, whether plaintiff was employed by defendant, or requested by him to procure a tenant held, under the evidence, a question for the jury.—Ballentine v. Mercer, Mo., 109 S. W. Rep. 1037.

28.——Commissions.—It was no defense to a broker's action for commissions that the memorandum of sale did not provide for exactly the same interest terms that the owner demanded; the brokers having offered to make good the difference.—Riker v. Post, 110 N. Y. Supp. 79.

29. **Cancellation of Instruments**—False Representations.—A party, suing for the cancellation of an instrument on the ground that false representations induced the making of it, has the burden of proving the false representations.—United States Fidelity & Guaranty Co. v. First Nat. Bank of Dundee, Ill., 84 N. E. Rep. 670.

30. **Carriers**—Damages for Delay in Shipment.—Generally damages for delay in shipment or loss of property while in a carrier's custody may be recovered either in an action ex contractu or one ex delicto, at the option of the pleader.—Wernick v. St. Louis & S. F. R. Co., Mo., 109 S. W. Rep. 1027.

31.——Failure to Properly Route Shipment.—The rule that a carrier is required to follow the shipper's instructions in routing and on failure to do so becomes an insurer held not to affect the general rule for the measure of damages for breach of a contract of carriage.—St. Louis Southwestern Ry. Co. of Texas v. Louisiana & Texas Lumber Co., Tex., 109 S. W. Rep. 1143.

32.——Liability for Passenger Effects.—A carrier is not liable for loss or injury to personal effects carried by a passenger, even though the loss or injury occurs through its negligence, either as carrier or warehouseman, where the effects are not baggage.—Mexican Cent. Ry. Co. v. De Rosear, Tex., 109 S. W. Rep. 949.

33.——Rules and Practices.—The reasonableness of the time within which a carrier must receive moneys or goods for transportation is measured primarily by its relation to the transportation of the property to the business of the carrier with proper consideration of the business of its customers.—Platt v. LeCocq, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 723.

34. **Charities**—Rights of Heirs.—After a charitable trust has been established the heirs of the creator of the charity had no further interest in the proceedings, the protection of the rights of the public being within the jurisdiction of the attorney general.—In re Burnham, N. H., 69 Atl. Rep. 720.

35. **Chattel Mortgages**—Property to be Manufactured.—Where a contract for the sale of buggies reserved a lien, it was immaterial that the buggies were not in existence when the contract was made; the buyer being required to file the contract on delivery of the buggies, if he desired a lien thereunder.—Pontiac Buggy Co. v. Skinner, U. S. D. C., N. D. N. Y., 158 Fed. Rep. 958.

36. **Constitutional Law**—Attempt to Influence Jurors.—Under Pen. Code, Secs. 190, 193, an attempt to corrupt jurors constitutes a contempt, without reference to whether they have been drawn to try the particular case with reference to which they were sought to be influenced.—State v. District Court of Second Judicial District, Mont., 95 Pac. Rep. 593.

37.——Criminal Prosecutions.—Whether one has been guilty of such violation of the law as justifies the seizure of his property or the infliction of punishment can only be determined by a court of competent jurisdiction.—Canon City v. Manning, Colo., 95 Pac. Rep. 537.

38.——Legislature and Judiciary.—Whether the public good requires that the sale of liquor as a beverage should be entirely or only partially prohibited is for the legislature to determine, in the exercise of its discretion, and it is not for the court to inquire into the expediency or wisdom of such legislation.—State v. Roberts, N. H., 69 Atl. Rep. 722.

39.——License Tax.—Rev. St. 1887, Sec. 1645, as amended by Act March 12, 1903 (Sess Laws 1903), will, under Const. art. 7, Sec. 2, be presumed to apply only to proprietors or keepers of billiard tables using the same in "doing business."—Ex parte Gale, Idaho, 95 Pac. Rep. 679.

40.——Regulation of Carriers.—Laws 1907, c. 199, requiring railway companies to sell 1000-mile tickets to purchasers to be used by themselves and their families at a rate lower than the maximum rate under which others may purchase, held to deny due process of law, and equal protection of the laws.—State v. Great Northern Ry. Co., N. D., 116 N. W. Rep. 89.

41.——Right to Contest Validity of Statute.—A corporation purchasing the property and franchise of another corporation held not entitled to question the validity of an act accepted and acted on by the latter corporation.—State v.

Portland General Electric Co., Or., 95 Pac. Rep. 722.

42.——Statutes.—When a state adopts the constitutional or legislative provisions of another state, it also adopts the construction given to such provisions by the decisions of the court of the state from which they are taken.—Lace v. People, Colo., 95 Pac. Rep. 302.

43.——Taxation.—The provision of Laws 1899, p. 44, c. 41, that the total county tax rate shall not exceed eight mills on the dollar for all purposes held to violate Const. art. 6, Sec. 12, and article 13, Sec. 5.—Fremont, E. & M. V. R. Co. v. County of Pennington S. D., 116 N. W. Rep. 75.

44.——Vested Rights.—Laws 1907, p. 124, c. 91, providing that the total expense of widening a street should be borne by the municipality, notwithstanding any assessments theretofore levied, held not unconstitutional.—In re Lochift, 110 N. Y. Supp. 32.

45. **Contracts**—Construction.—Where the performance of an obligation is prevented by one of the parties to a contract, the party prevented from discharging his part of the obligation will be treated as though he had performed it.—Empson Packing Co. v. Clawson, Colo., 95 Pac. Rep. 546.

46. **Corporations**—Right to do Business in Foreign State.—Where plaintiff, a foreign corporation, alleged its right to do business in the state at the time of the execution of instruments sued on, a general denial held to raise the issue of a permit vel non, and to place on plaintiff the burden of proving authority to do business in the state at the time in question.—Turner v. National Cotton Oil Co., Tex., 109 S. W. Rep. 1112.

47.——Transfer of Assets.—A corporation by the joint action of all officers, directors, and stockholders cannot authorize the application of corporate assets, as against corporate creditors to the personal debts of the corporation's officers.—Ward v. City Trust Co. of New York, N. Y., 84 N. E. Rep. 585.

48.——Unconscionable Purchase of Property.—Sale of certain real estate by the president of a corporation through his wife, its secretary, for an unconscionable consideration, held unsustainable; the corporation's receiver being entitled to credit on the purchase mortgage for the difference between the cost of the land to the wife and the price received by her from the corporation.—Voorhees v. Malott, N. J., 69 Atl. Rep. 643.

49. **Criminal Law**—Certificate of Reasonable Doubt.—Compelling a person to appear before a grand jury and testify in a forgery case to facts bearing on his guilt of illegally practicing medicine, for which he was subsequently indicted by the same grand jury, held ground for granting a certificate of reasonable doubt on his appeal from a judgment of conviction.—People v. Flaherty, 110 N. Y. Supp. 154.

50.——Nolle Prosequi.—The statute requiring the county attorney to file his reasons for ordering the dismissal of a criminal prosecution held directory.—Williams v. State, Tex., 110 S. W. Rep. 63.

51. **Criminal Trial**—Favorable Error. — A judgment of conviction will not be reversed on defendant's appeal for error in imposing a shorter term of imprisonment than the statute authorizes.—People v. Oliver, Cal., 95 Pac. Rep. 172.

52.——Instructions.—The refusal of the court in a trial for perjury to state in its charge the rule requiring a single witness to be corroborated by circumstances to establish any material fact charged held proper on the ground that the rule was not applicable to the facts of the particular case.—O'Leary v. United States, U. S. C. C. of App., First Circuit, 158 Fed. Rep. 796.

53. **Damages**—Excessive Damages.—In a personal injury suit against a carrier, a judgment for $5,000 held excessive, and defendant entitled to a new trial, unless plaintiff agrees to accept $2,500.—Hemenway v. Washington Water Power Co., Wash., 95 Pac. Rep. 269.

54.——Liquidated Damages.—A contract by a vendor to pay an amount in excess of lawful interest on default of a simple contract debt is a contract for a penalty and against public policy.—United Shoe Machinery Co. v. Abbott, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 762.

55.——Personal Injuries.—Where plaintiff was struck by a "tie-jack" negligently allowed to fall from a flat car, and his nose broken, his upper lip split, the cord of his upper lip broken or mashed so that he had lost the use of the lip and his wrist broken, by reason of which he suffered great bodily and mental pain, and was permanently disfigured and disabled, $5,000 damages was not excessive.—Gurdon & Ft. Smith Ry. Co. v. Calhoun, Ark., 109 S. W. Rep. 1017.

56. **Dismissal and Nonsuit**—Consent.—Where executors were enjoined from expending more than a certain amount in erecting a mill, and this sum was afterwards extended by a consent order, the injunction could not afterwards be dissolved and the suit dismissed, except by consent of parties.—In re Ward's Estate, Mich., 116 N. W. Rep. 23.

57. **Divorce**—Cruelty.—In a divorce action, evidence held not to show the infliction of bodily harm or a reasonable apprehension of such harm which would justify a divorce on the ground of intolerable severity.—Mathewson v. Mathewson, Vt., 69 Atl. Rep. 646.

58. **Electricity** — Negligence. — Proof that plaintiff's husband was killed by a shock of electricity communicated by defendant's wire to that which the husband encountered held sufficient to require defendant to establish freedom from negligence under the doctrine res ipsa loquitur.—Brown v. Consolidated Light, Power & Ice Co., Mo., 109 S. W. Rep. 1032.

59. **Eminent Domain**—Right to Damages.—Where a railway company after a street is vacated enters on a strip of land formerly embraced in the street and without compensation, it is liable in damages for any depreciation in the value of the property not taken.—Bullen v. Arkansas Valley & W. Ry. Co., Okl., 95 Pac. Rep. 476.

60.——Injuries to Property.—An abutting property owner whose means of access to his property have been cut off or materially interrupted by a railway track on the street may recover damages therefor.—Foster Lumber Co. v. Arkansas Valley & W. Ry. Co., Okl., 95 Pac. Rep. 224.

61.——Property Which May be Taken.—Where a dam was built by authority of law and maintained for more than forty years, the pond being sufficient to float small craft, a drainage commission has no authority to destroy it, although the meandered limits of the river did not show such a pond.—In re Horicon Drainage Dist., Wis., 116 N. W. Rep. 12.

62.——Who may Appeal.—Only persons having an estate or interest in the land taken can appeal from the estimate of damages, and per-

sons succeeding to the estate or interest of a deceased appellant cannot prosecute the appeal.—Hayford v. Municipal Officers of City of Bangor, Me., 69 Atl. Rep. 688.

63. **Evidence**—Opinion Evidence.—A witness, after narrating the language and conduct of a person, held entitled to state, the inference that the person had a willful, unpleasant, and domineering disposition.—Mathewson v. Mathewson, Vt., 69 Atl. Rep. 646.

64.——Presumption as to Official Duties.—The presumption that a public officer has performed his duty is applicable to the duty of a county judge to pay to the county treasurer the surplus fees of his office.—Frost v. Board of Comrs. of Teller County, Colo., 95 Pac. Rep. 289.

65. **Execution**—Rights of Purchaser.—Where a judgment creditor redeemed from a mortgage foreclosure sale and resold the land, the title of the purchaser at such resale related back to the date of the execution of the mortgage.—Luken v. Fickle, Ind., 84 N. E. Rep. 561.

66. **Executors and Administrators** — Allowance of Claims.—The allowance of a sum due on a note against an estate by the commissioners for the allowance of claims is equivalent to a judgment, and merges the original claim, and the burden is upon one alleging the outlawry of that judgment to prove it.—Warren's Admr. v. Bronson, Vt., 69 Atl. Rep. 655.

67. **Fish**—Power to Regulate.—The law of Oregon prohibiting fishing in the Columbia river held not to deprive one having a license to fish therein issued by the state of Washington of any rights granted by the license.—State v. Nielsen, Or., 95 Pac. Rep. 720.

68. **Fixtures**—Effect of Lease.—A lease held to restrict the lessee's right to remove trade fixtures to such fixtures and alterations only as could be taken out of the building without interference with or detriment to the building, including its walls, ceilings and doors.—Excelsior Brewing Co. v. Smith, 110 N. Y. Supp. 8.

69. **Frauds, Statute of**—Contracts Performed as to Part Within Statute.—The provisions of the statute of frauds or of uses and trusts have no application where an agreement has been completely performed as to the part thereof which comes within the statute, and the part remaining to be performed is merely a payment of the money.—Logan v. Brown, Okl., 95 Pac. Rep. 441.

70.——Estoppel.—Where a party to an oral agreement to convey land conveys it, and the other parties accept it, under the contract, they are estopped to raise the objection that the contract was not in writing, as required by the statute of frauds.—Pearsall v. Henry, Cal., 95 Pac. Rep. 159.

71. **Fraudulent Conveyance**—Action to Set Aside.—Where a deed intended to defraud a former purchaser is made and recorded, the former purchaser gains nothing by subsequently recording his deed, but his remedy is by timely action to set aside the fraudulent deed.—McDonald v. Sullivan, Wis., 116 N. W. Rep. 10.

72.——Validity of Transaction Between Parties.—A person inducing another by misrepresentations to convey land to her, to be reconveyed on demand, held not allowed to take refuge behind the pretense that in yielding to her solicitations the grantor committed a wrong against others, so as to deprive him of redress for her refusal to reconvey.—Chamberlain v. Chamberlain, Cal., 95 Pac. Rep. 659.

73. **Guaranty**—Scope and Extent.—Where a building contract provides for guaranty from a subcontractor, such provision cannot be extended by the subcontractor to a contract between himself and one furnishing labor and materials, unless he expressly stipulates for the same.—Warren-Ehret Co. v. Byrd, Pa., 69 Atl. Rep. 751.

74. **Husband and Wife**—Property Rights.—Property rights of husband and wife are, except as modified by statute, to be judged by the Spanish law in force in New Mexico at the date of its acquisition from Mexico.—Reade v. De Lea, N. M., 95 Pac. Rep. 131.

75. **Indians**—Land Allotment.—Where a citizen of the Creek Nation, who on April 22, 1899, had selected her allotment on the public domain died before patent issued, a patent therefor, issued to the heirs of such person without naming them vested in them the title to the land.—De Graffenreid v. Iowa Land & Trust Co., Okl., 95 Pac. Rep. 624.

76. **Intoxicating Liquors**—Liquor Licenses.—A county ordinance relating to the granting of retail liquor licenses, held not invalid as allowing the electors to take the determination as to a license away from the board of supervisors.—Davis v. Board of Sup'rs. of Merced County Cal., 95 Pac. Rep. 170.

77. **Judgment**—Conclusiveness.—A final accounting of an executor before a surrogate does not preclude a proceeding against him for a subsequent accounting, based upon discovered assets which were not included in the first accounting.—In re Heaney's Estate, 110 N. Y. Supp. 80.

78.——Res Judicata.—To operate as a bar to a subsequent suit, the dismissal of a suit must have been on the merits, or, if voluntary, after proofs taken and the case was in readiness for hearing.—In re Ward's Estate, Mich., 116 N. W. Rep. 23.

79. **Landlord and Tenant**—Damages for Turning Off Heat.—A tenant held estopped to claim damages for turning off heat, by a covenant that no action should be brought for trespass in case of dispossession after forfeiture.—Howe v. Frith, Colo., 95 Pac. Rep. 603.

80.——Defective Premises.—A tenant is not guilty of contributory negligence, as a matter of law, in continuing to use defective premises after repeated asurances by the landlord that he would repair, so as to preclude the tenant's recovery for personal injuries, unless the risk was so obvious as to threaten immediate danger.—Graff v. Lemp Brewing Co., Mo., 109 S. W. Rep. 1044.

81.——Estoppel to Deny Landlord's Title.—A tenant is not estopped to deny his landlord's title in an action wherein the landlord claims title in fee, but is estopped merely in actions arising out of that relation.—Hebden v. Bina, N. D., 116 N. W. Rep. 85.

82.——Liability for Rent.—Lessee, having continued to occupy the premises after breach by lessor of a covenant not a condition precedent to the payment of rent, held liable for rent.—White v. Young Men's Christian Assn. of Chicago, Ill., 84 N. E. Rep. 658.

83. **Libel and Slander**—Actionable Words.—A publication charging a person with a statutory offense, designating it as "assault and battery with intent to kill," held actionable, though the offense was not charged in the words of the statute as "assault with intent to kill."—Gordon v. Journal Pub. Co., Vt., 69 Atl. Rep. 742.

84. **Logs and Logging**—Scale Bill.—In an ac-

tion on a contract under which plaintiff agreed to cut and haul certain logs at a fixed sum per thousand feet, verdict for plaintiff for the amount cut and hauled according to the scale bill of the surveyor agreed upon held sustained by the evidence.—Atwood v. Maine Hub & Mfg. Co., Me., 69 Atl. Rep. 622

85. **Master and Servant**—Assumed Risk.—Where a servant knows or should reasonably know the risks to which he is exposed, he will as a rule be held to assume them; but where he does not know, or knowing, does not appreciate such risks, and his ignorance or nonappreciation is not due to want of care on his part, he does not assume the risk.—Millen v. Pacific Bridge Co., Or., 95 Pac. Rep. 196.

86.——Defective Appliances.—Where defendant directed its employees to work on a scaffold which was already built, it was bound to exercise due care in selecting materials reasonably suitable and safe for the construction of the scaffold.—Barkley v. South Atlantic Waste Co., N. C., 61 S. E. Rep. 565.

87.——Defective Appliances.—Where an employee is injured by a machine, the master is not liable because of the removal from the machine before the accident of a small appliance which was not a safety appliance, and which would not if in use, have avoided the accident.—Calhoun v. Holland Laundry, Pa., 69 Atl. Rep. 756.

88.——Defective Appliances. — An employer must exercise diligence to furnish to its employees reasonably safe appliances, and, in the absence of any notice thereof, the employees may assume that the duty has been discharged.—Rush v. Oregon Power Co., Or., 95 Pac. Rep. 193.

89.——Negligence of Servant.—Where a servant was employed to manufacture a certain article from materials owned by his employer, acceptance of the finished product and sale thereof by the latter held not to constitute a waiver of damages for the servant's negligence.—Wenger v. Marty, Wis., 116 N. W. Rep. 7.

90.——Safe Place to Work.—A master, while free to adopt and carry out its own plans for dismantling a building, held required to exercise the standard of care prescribed by law for the safety of its servants.—American Window Glass Co. v. Noe, U. S. C. C. of App., Seventh Circuit, 158 Fed. Rep. 777.

91.——Safe Place to Work.—Where defendant permitted oil to drip from a shaft hanger onto the floor near where plaintiff was required to work, and plaintiff slipped on the oil and was injured, defendant was negligent.—Leazotte v. Jackson Mfg. Co., N. H., 69 Atl. Rep. 640.

92. **Mechanics' Lien**—Right to Enforce. — A contractor is not entitled to enforce a mechanic's lien, where it does not appear that the work and material necessary to entitle him to the stipulated payment has been done and furnished.—Paturzo v. Shuldiner, 110 N. Y. Supp. 137.

93. **Municipal Corporations**—Commitment Under Municipal Ordinance. — A commitment is proper where the sentence for the violation of a municipal ordinance is imprisonment without a fine, and, where the sentence is imprisonment in default of payment of the fine, a commitment to carry the judgment into effect is proper.—Olson v. Hawkins, Wis., 116 N. Y. Supp. 18.

94.——Contract Bids.—Where the thing to be furnished under a municipal contract is protected by a patent, and any one of a number of particular kinds complies with the standard alternative bids are proper.—Parker v. City of Philadelphia, Pa., 69 Atl. Rep. 670.

95.——Highways.—A municipality is not under a similar obligation as to lateral support to the owner of land abutting a street as adjacent land-owners are to each other, because as to the construction and maintenance of a public highway it exercises a governmental function.—Village of Haverstraw v. Eckerson, N. Y., 84 N. E. Rep. 378.

96.——Removal of Policemen.—While the power to convict and punish a patrolman for conduct unbecoming an officer is vested solely in the police commissioner, he may do so upon evidence taken at a hearing before a deputy commissioner and reported to him; but he must himself pass upon the evidence.—People v. McAdoo, 110 N. Y. Supp. 140.

97.——Statutes Authorizing Indebtedness.—St. 1901, p. 27, c. 32, authorizing the incurring of indebtedness by cities, etc., for municipal improvements, and the submission of propositions to the electors, authorized the submission of a proposition for incurring an indebtedness for acquiring a public park.—City of San Diego v. Potter, Cal., 95 Pac. Rep. 146.

98. **Negligence**—Dangerous Premises.—In an action against the proprietors of a department store to recover for personal injuries in falling down a hatchway in a public pavement alongside of the store, evidence held to sustain verdict for plaintiff.—Ayres v. Wanamaker, Pa., 69 Atl. Rep. 759.

99.——Proximate Cause.—A person is liable for injuries resulting from his negligent act if they are the natural, though not inevitable, result thereof or such injuries as are ordinarily likely to ensue therefrom, though he may not have been able to foresee them.—Evansville Hoop & Stave Co. v. Bailey, Ind., 84 N. E. Rep. 549.

100.——Question for Jury.—Where negligence is dependent on inferences to be drawn from acts of that character that different intelligent minds may honestly reach different conclusions whether negligence has been established is for the jury.—Farrier v. Colorado Springs Rapid Transit Ry. Co., Colo., 95 Pac. Rep. 294.

101. **Principal and Agent** — Authority of Agent.—One who leads an innocent party to rely on the appearance of another's authority to act for him will not be heard to deny the agency, to that party's prejudice.—United States Fidelity & Guaranty Co. v. Shirk, Ok., 95 Pac. Rep. 218.

102. **Public Lands**—Homestead Entry.— One making a homestead entry of land inclosed, cultivated and in the actual possession of another held to have no right to dispossess the other.—Carmichael v. Campodonico, Cal., 95 Pac. Rep. 164.

103. **Railroads**—Continuous Trip.—A railroad corporation, not operating a single system, may operate two or more lines of road between its terminals; but a passenger purchasing a through ticket to his point of destination cannot take a circuitous road.—Kelly v. New York City Ry. Co., N. Y., 84 N. E. Rep. 569.

104.——Injury to Trespassers.—Railroad company held not liable for damages for death of pedestrian caused by the backing of an engine and cars on to a side track, putting in motion a number of cars thereon and causing the pedestrian to be run over.—Curtis v. Southern Ry. Co., Ga., 61 S. E. Rep. 539.

105. **Receivers**—Mortgages.—Where a receiver is appointed to collect the rents of mortgaged property for the benefit of a junior mortgagee, the senior mortgagee not objecting, may not after sale have such order modified to secure the benefit of the rents collected thereunder.—Goddard v. Clarke, Neb., 116 N. W. Rep. 41.

106. **Release**—Execution.—A finding that a release relied on by defendant to defeat an action for personal injuries was never signed by plaintiff is justified on the positive testimony of plaintiff that he never signed the release as pleaded by defendant.—Dalton v. Pacific Electric Ry. Co., Cal., 94 Pac. Rep. 868.

107. **Remainders**—Limitation of Actions. — Where real estate is in the possession of a life tenant, limitations do not run against the remainderman until the death of the life tenant or until his life estate is otherwise terminated. —Webster v. Pittsburg, C. & T. R. Co., Ohio, 84 N. E. Rep. 592.

108. **Removal of Causes**—Citizenship of Defendants.—An action by a citizen of another state against citizens of the state in which it is brought and aliens is not removable.—Hackett v. Kuhne, U. S. C. C., S. D. N. Y., 157 Fed. Rep. 317.

109.——Remand.—Where a cause is erroneously removed from a state court to the Circuit Court of the United States and thereafter remanded, all orders made by the United States court, except the one remanding the case, are void.—Floody v. Chicago, St. P., M. & O. Ry. Co., Minn., 116 N. Y. Supp. 111.

110. **Sales**—Conditional Sales.—Where a sale was made on condition that the title remain in the seller until the purchase price was paid, the seller is entitled to immediate possssion in case of default in the payment of any installment of the purchase price.—Berger v. Miller, Ark., 109 S. W. Rep. 1015.

111. **Specific Performance** — Contracts Enforceable.—A vote of a corporation's directors to grant a privilege to sell candy, popcorn, etc., held not a contract specifically enforceable.— Hazard v. Hope Land Co., R. I., 69 Atl. Rep. 602.

112.——Gifts.—One promising to make a gift of real estate held required to make the gift on the promisee accepting the promise, entering into possession and making improvements.— Coleman v. Larson, Wash., 95 Pac. Rep. 262.

113. **Street Railroads**—Injury to Child on Track.—In an action for the death of a six-year old child, caused by being struck by defendant's electric car, the submission of the cause to the jury on the theory of the humanitarian rule alone held erroneous.—Gabriel v. Metropolitan St. Ry. Co., Mo., 109 S. W. Rep. 1042.

114. **Subrogation**—Purchase of Mortgaged Property.—A purchaser of land from a husband subject to a mortgage under a deed in which the wife did not join held entitled to be subrogated to the rights of the mortgagee under the mortgage, though it has been paid, as against the rights of the grantor's widow.—Overturf v. Martin, Ind., 84 N. E. Rep. 531.

115. **Sunday**—Amusements.—A moving picture exhibition is a "show," within Pen. Code, Sec. 265, prohibiting all exercises or shows on Sunday.—Gale v. Bingham, 110 N. Y. Supp. 12.

116. **Taxation**—Property Devoted to Public Use.—So much of a village electric light plant as was devoted to furnishing electric light to other villages and their inhabitants held not exempt from taxation as devoted to a public use.—Village of Swanton v. Town of Highgate, Vt., 69 Atl. Rep. 667.

117.——Tax Sale.—Where the owner of property sold at a tax sale moves to deny confirmation for inadequacy of price and offers to increase the bid on resale, he admits the jurisdiction and confesses the justice of the decree of sale, and is estopped to dispute either.—State v. Several Parcels of Land, Neb., 116 N. W. Rep. 40.

118. **Telegraphs and Telephones**—Municipal Corporations.—The right of a city to control a telephone company within its limits results from statute, and not from the ordinance or action of local authorities by which the consent is given to the company to operate a line in the city; and a consent once given cannot be revoked.—Missouri River Telephone Co. v. City of Mitchell, S. D., 116 N. W. Rep. 67.

119. **Torts**—Acts Constituting, Breach of Duty.—The principle stated, giving a right of action ex delicto to the injured party for the violation of a duty arising out of a breach of contract, or resulting from a status between the parties.—Graff v. Lemp Brewing Co., Mo., 109 S. W. Rep. 1044.

120. **Trover and Conversion** — Measure of Damages.—If defendant in converting a growing crop had no reasonable ground to believe it was his, the owner's measure of damage was the value of the property at the time it was converted, without any deduction for any labor bestowed upon it by defendant.—Ayers v. Hobbs, Ind., 84 N. E. Rep. 554.

121.——Persons Liable.—One who aids in the wrongful taking of chattels is liable for the conversion thereof, though he acted as agent.— Starr v. Bankers' Union of the World, Neb., 116 N. W. Rep. 61.

122. **Waters and Water Courses**—Duties of Water Commissioner.—It is not the duty of a water commissioner to make any division or distribution of water between the users thereof from the same ditch, and he has no authority to interfere with the internal management of the affairs of a ditch company.—Cache La Poudre Irrigating Ditch Co. v. Hawley, Colo., 95 Pac. Rep. 317.

123.——Rights of Riparian Proprietors.—There is no priority between the rights of riparian proprietors to the water of a nonnavigable stream, but their rights are equal, regardless of location on the stream or the date of acquiring their title.—Williams v. Altnow, Or., 95 Pac. Rep. 200.

124. **Wills**—Contingent Remainders.—Where a testator left property to his unmarried daughter with the provision that, upon her death, it should pass to her issue, if she should leave issue living at her death, no present interest passed to her children under the will, but the remainder created was a contingent one.—Janette v. Bell, Ky., 110 S. W. Rep. 298.

125.——Land Subject to Legacies. — Where land, live stock, and farming tools were bequeathed, charged with the payment of legacies, and the land was subsequently conveyed to one who as a part consideration therefor covenanted to pay the legacies according to the provisions of the will, the charge on the mixed property as against him and those claiming under him was made to rest primarily on the land in exoneration of the personalty.—Warren's Admr. v. Bronson, Vt., 69 Atl. Rep. 655.